



## INTERIOR BOARD OF INDIAN APPEALS

Niagara Mohawk Power Corp. v. Eastern Area Director, Bureau of Indian Affairs

32 IBIA 276 (07/23/1998)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

NIAGARA MOHAWK POWER CORPORATION

v.

EASTERN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 96-54-A

Decided July 23, 1998

Appeal from a decision declining to approve retroactively agreements for providing electric service on the Tonawanda and Tuscarora Reservations in the State of New York.

Affirmed.

1. Indians: Generally--Indians: Lands: Generally--Indians:  
Reservations: Generally

Federal law, including the Indian Non-Intercourse Act, 25 U.S.C. § 177 (1994), applies to Indian lands located in the State of New York.

APPEARANCES: Steven R. Pincus, Esq., and Ferdinand L. Picardi, Esq., Syracuse, New York, for Appellant; John H. Harrington, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Atlanta, Georgia, for the Area Director; Harold M. Halpern, Esq., Buffalo, New York, for the Tonawanda Band of Seneca Indians and the Tuscarora Nation.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Niagara Mohawk Power Corporation seeks review of a decision issued on January 29, 1996, by the Eastern Area Director, Bureau of Indian Affairs (Area Director; BIA). The decision declined Appellant's request that BIA retroactively approve two agreements which Appellant had entered into with the Tonawanda Band of Seneca Indians of New York (Tonawanda Band) and the Tuscarora Nation of New York (Tuscarora Nation; collectively, Nations) for the provision of electric service on the Nations' Reservations. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

### Background

On April 27, 1936, the Tonawanda Band entered into an agreement with the Niagara, Lockport and Ontario Power Company (NLOPC). The agreement provided that the Band,

for and in consideration of the sum of One Dollar (\$1.00) \* \* \*, and in further consideration of the mutual advantages accruing to the parties hereto, has granted and conveyed and does hereby grant and convey unto [NLOPC], its successors and assigns, the

right, privilege and easement to construct, maintain and operate electric lines, including such poles or other supporting structures, crossarms, insulators, wires, cables, guys, stubs, anchors, appliances and fixtures as the [NLOPC] may from time to time deem necessary or proper therefor, with the right to cut and trim such trees as the [NLOPC] may deem it necessary for the operation of the said electric lines, upon and across public highways, streets and roads, upon, over and through the said Tonawanda Indian Reservation, upon and across the common unallotted lands of the said Tonawanda Reservation, as well as upon and across the allotted lands of the said Reservation and Nation \* \* \*.

TO HAVE AND TO HOLD the above granted rights, privileges and easements unto the [NLOPC], its successors and assigns, for a period of ninety-nine (99) years from and after the date hereof.

\* \* \* \* \*

It is understood and agreed that the [NLOPC] will extend its lines and furnish service to any applicant within said Tonawanda Reservation under the terms and provisions, rules and regulations of the schedules filed with and approved by the Public Service Commission of the State of New York [(PSC)] as the same may be from time to time revised or amended.

It is further agreed between the parties that this agreement shall not be valid or effectual until the same has been ratified by the County Court of Genesee County and approved by the [PSC. 1/]

At the time the agreement was entered into, one member of the Tonawanda Band's Council of Chiefs believed that it required Federal approval. The agreement was submitted to the Department of the Interior (Department),

---

1/ The Board obtained a copy of the current New York State (State) laws from the Internet at <http://www.findlaw.com/11stategov/ny/nycl.html>. This version of the law does not show the date or history of enactment and/or amendment of particular sections. It appears, however, that the approval requirement set out in the agreement arises from N.Y. Transp. Corp. § 17, Construction over Indian Reservation, which provides:

"A gas corporation, an electric corporation or a gas and electric corporation may contract with the chiefs of any nation of Indians over whose lands it may be necessary to construct its gas or electric lines for the right to construct such lines upon such lands, but no such contract shall vest in the corporation the fee of such lands nor the right to occupy the same for any purpose other than for the construction, operation and maintenance of such lines, nor shall such contract be valid or effectual until the same has been ratified by the county court of the county in which the lands are situated and approved by the public service commission pursuant to section sixty-eight of the public service commission law."

which informed the Band that Federal approval was not necessary. There is no dispute that the agreement was approved in accordance with State law.

The Tuscarora Nation entered into a virtually identical agreement with the Buffalo Niagara Electric Corporation (BNEC) on October 19, 1937. Again, there is no dispute that this agreement was not approved by the Department, but was approved in accordance with State law.  
2/

By letter dated October 17, 1995, Appellant, the successor-in-interest to both the NLOPC and the BNEC, wrote to the Area Director asking that the agreements be approved retroactively under 25 U.S.C. § 81 (1994). 3/ Appellant asserted that it had "become unwillingly involved in intra-tribal disputes on the Reservations." It continued:

These disputes arise out of the conflicts between the Council of Chiefs and so-called "entrepreneur" factions on the Reservations who are tribal members residing on the Reservations. The Indian Tribal Councils of the Tuscarora Nation and the Tonawanda Band \* \* \* are requiring their consent before [Appellant] may provide service to an applicant. In the Franchise Agreements, there is no such provision for [Appellant] to obtain prior consent of the respective Council prior to hooking up service for an applicant. The imposition of the Tribal consent requirement results in discriminatory service practices.

[Appellant's] and the public's interest is adversely affected by your Office's inaction in this matter. A ruling by your Office is necessary for [Appellant] to meet its statutory obligations under the New York State Public Service Law. Since the Franchise Agreements require [Appellant] to render service to applicants on the Reservations upon the terms and provisions, rules and regulations of [Appellant's] schedules filed with the [PSC], approval by your Office of the Franchise Agreements will result in [Appellant] being required by the PSC to serve the Reservations on a non-discriminatory basis \* \* \* and may end the current situation where applicants on the Reservations are unable to obtain electric service from [Appellant] because of the Tribal consent requirement. On the other hand, continued inaction by your Office will result in the standoff continuing where applicants on the Reservation are unable to obtain electric service from [Appellant] and continue to subject [Appellant] to legal claims and potential liability therefrom.

Appellant's Oct. 17, 1995, Letter at 1-2.

---

2/ These agreements are collectively referred to in this decision as the "agreements" or the "franchise agreements."

3/ Section 81 is quoted in text below. Unless otherwise indicated, all further citations to the United States Code are to the 1994 edition.

By letter dated October 24, 1995, the Nations wrote to the Area Director expressing their opposition to Appellant's request:

As a fiduciary, the BIA is responsible for acting in the best interests of the Indians \* \* \*. The franchise agreements are clearly not in the best interests of the Tonawanda and Tuscarora Nations.

First, as interpreted by [Appellant], the franchise agreements give [Appellant] the unrestricted right to enter tribal territory and supply electrical services on demand to individual applicants without the nations' consent and regardless of whether such individuals have any right to reside or conduct business on tribal lands. Such agreements would drastically undermine the sovereign authority of the nations over access to and development of tribal territory, particularly in light of the nations' traditional reliance on informal methods of enforcement of tribal laws and customs.

Second, the recognized governing bodies of both the Tonawanda and Tuscarora nations oppose approval of the franchise agreements. The Secretary has noted that an Indian nation's opposition to an agreement for which approval is sought is "entitled to great weight . . . in light of the well-established federal policy recognizing a government-to-government relation with the tribes and favoring tribal self-determination." Quoted in United States ex rel. Shakopee [Mdewakanton Sioux Community] v. Pan American [Management Co.], 616 F. Supp. 1200, 1213 (D.C. Minn. 1985), appeal dismissed, 789 F.2d 632 (8[th] Cir. 1986).

Finally, [Appellant's] contention that its interests and "the public's interest" is adversely affected by the failure of the BIA to approve the franchise agreements is irrelevant. It is neither [Appellant's] interests nor those of "the public" that 25 U.S.C. section 81 is designed to protect. "It is uncontroverted that the statute, 25 U.S.C. section 81, was enacted solely for the benefit of Indians," United States ex rel. Shakopee, supra, 616 F. Supp. at 1208; see also Western Shoshone [Business Council v. Babbitt], 1 F.3d 1052, 1056 (10th Cir. 1993)] (non-Indian contracting party is not within the "zone of interest" protected by section 81).

Nations' Oct. 24, 1995, Letter at 2.

By letter dated November 16, 1995, the Chairman of the PSC wrote to the Area Director in support of Appellant's request. The Chairman stated:

This matter is pending before you as a result of a [PSC] order which directed [Appellant] to submit the 1936 and 1937 franchise agreements to [BIA] for a determination as to their validity under 25 U.S.C. § 81. [Appellant] initially petitioned the [PSC] for a ruling concerning its responsibilities

to serve the residents of the Indian Nations. The [PSC] found that it does not have jurisdiction over the provision of electric service to the Tuscarora and Tonawanda Nations. Our staff and members of the Governor's office met with both [Appellant] and representatives of the Indian Nations to determine whether there was a solution to this situation. The order was issued after it became clear that the parties' positions were intractable.

The franchise agreements dictate that [Appellant] provide service to residents of the Indian Nations in accordance with company tariffs which require non-discriminatory service. Validation of the agreements by [BIA] is the critical first step in bringing utility service to all residents of the Tuscarora and Tonawanda Nations.

PSC's Nov. 16, 1995, Letter at 1.

On November 21, 1995, the Nations provided a memorandum of law setting forth in greater detail their opposition to Appellant's request. They contended that the agreements were rights-of-way that were void under 25 U.S.C. § 177 and 43 U.S.C. § 961 for lack of Federal approval, and that Appellant can presently acquire rights-of-way on the Reservations only under 25 U.S.C. § 323. 4/

The Area Director responded to Appellant's request on January 29, 1996. She stated:

For the reasons set out below, it is our position that [25 U.S.C.] Section 81 is not applicable and the applicable statute in fact is 25 U.S.C. Section 323 and its implementing regulations, 25 C.F.R. Part 169. \* \* \* [A] right-of-way (ROW) is the proper instrument to convey the interests necessary to provide electricity on the lands of the two Indian reservations.

\* \* \* \* \*

Your application under Section 81 assumed that provision of electricity did not require a ROW, apparently because, in your view, an interest in land was not being conveyed. In our view, however, an interest in land is necessarily conveyed when a company obtains the long-term right to place poles and wires on Indian land and to have continued access to those poles and wires. The poles and wires cross Indian lands, creating the necessity for a ROW.

Under 25 U.S.C. Section 177 any conveyance of an interest in land not authorized by Congress is void. See e.g., Oneida

---

4/ The referenced statutes are quoted and discussed in text below.

*Indian Nation v. County of Oneida*, 414 U.S. 661, 669 (1974). Thus, although the earlier franchise agreements purport to allow for the provision of electricity, they do so without compliance with the requisite statute and hence are void.

The statute under which ROW's may be legally conveyed is 25 U.S.C. Section 323. Under that statute it is the Secretary of the Interior who grants such a ROW upon the consent of the Indian Tribe and upon compliance with the regulations in 25 C.F.R. Part 169.

Decision at 1-2.

Appellant appealed to the Board. <sup>5/</sup> While this appeal was pending, an appeal was filed with the Board concerning a tribal leadership dispute within the Tuscarora Nation. Although the Board stayed further filings in this appeal pending the resolution of the leadership dispute, it authorized the parties to continue settlement negotiations. Those negotiations were unproductive. On November 17, 1997, the Board addressed the leadership dispute in Cusick v. Acting Eastern Area Director, 31 IBIA 255. Following the issuance of the decision in Cusick, the Board resumed briefing in this case. Briefs have been filed by Appellant, the Area Director, and the Nations.

#### Discussion and Conclusions

Appellant and the Area Director disagree as to the issue raised in this appeal. Appellant argues that the issue is whether the agreements are

---

<sup>5/</sup> The Board received Appellant's appeal on Mar. 1, 1996. A case entitled Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians was apparently then pending before the United States Court of Appeals for the Second Circuit. That case was argued to the court on May 7, 1996, and a decision was issued on Aug. 23, 1996. See 94 F.3d 747 (2nd Cir. 1996). In that case present Appellant sought declaratory relief in the form of answers to two questions: "(1) whether the 1936 franchise agreement between [NLOPC] and the Tonawanda Band is valid; and (2) whether the terms of the agreement require it to secure the approval of the Council of Chiefs before granting applications for electric service." 94 F.3d at 749.

In determining whether the case involved a Federal question which would give it jurisdiction, the court noted that, although a question may have been raised as to whether 25 U.S.C. § 177 applied to the agreement, it was required to "first ascertain that there is in fact a live controversy over the validity of the franchise agreement." Id. at 752. Based upon both the initial pleadings and the arguments on appeal, the court concluded that there was no dispute as to the validity of the agreement and therefore no live controversy. It accordingly upheld the district court's dismissal of the case, holding that the case involved "a cause of action sounding in contract that arises solely under state law." Id. at 753.

governed by 25 U.S.C. § 81 and, if so, whether they should be approved retroactively. Section 81 provides in pertinent part:

No agreement shall be made by any person with any tribe of Indians \* \* \* for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands \* \* \* unless such contract or agreement be executed and approved as follows:

\* \* \* \* \*

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

\* \* \* \* \*

All contracts or agreements made in violation of this section shall be null and void \* \* \*.

The Area Director contends that the issue is "whether the Indian Non-Intercourse Act, 25 U.S.C. § 177 applies to the different variety of Indian land ownership patterns in the State of New York, represented in this case by the reservations of the Tonawanda Band and the Tuscarora Nation." Area Director's Answer Brief at 3. Section 177 provides in pertinent part: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

The Area Director further argues that the agreements grant Appellant rights-of-way on the Reservations and that, under 25 U.S.C. § 323, those rights-of-way require Federal approval. Section 323 provides:

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

The Nations support the Area Director's argument that 25 U.S.C. §§ 177 and 323 apply to the agreements.

[1] The Board sees no necessity for it to engage in an elaborate discussion of the applicability of 25 U.S.C. § 177. Despite the fact that there has been considerable uncertainty in the past on the part of Federal,

State, and Tribal officials as to whether section 177 applied to Indian reservations in the State, that question was definitively laid to rest by the Supreme Court in Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974):

The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the preemptive right to purchase from the Indians, was in the State, Fletcher v. Peck, 6 Cranch 87 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law. [Footnote omitted.]

414 U.S. at 670. Therefore, the Board holds that Federal law, including 25 U.S.C. § 177, applies to Indian lands located in the State. 6/

The question then raised in this appeal is which Federal law applies--25 U.S.C. § 81, as argued by Appellant, or 25 U.S.C. § 323, as argued by the Area Director and the Nations.

The agreements contain words of conveyance; they grant Appellant "the right, privilege and easement" to construct, maintain, and operate electrical poles and lines on the Reservations; they have a fixed term of 99 years; and they authorize Appellant to enter onto Reservation lands in order to construct, maintain, and operate its facilities. On their faces, the agreements appear to grant Appellant rights-of-way.

Furthermore, Federal law in effect when the agreements were executed explicitly stated that the granting of an easement or right-of-way was necessary for the erection of electrical poles and related structures on Indian reservations. In 1936 and 1937, 43 U.S.C. § 961 provided in pertinent part:

That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement

---

6/ This holding is consistent with the Board's prior decision in Jacobs v. Eastern Area Director, 20 IBIA 68 (1991). The Board there held that 25 U.S.C. § 81 applied to a bingo management contract on the St. Regis Mohawk Reservation. In reaching that conclusion, the Board relied on the Supreme Court's decision in Oneida. Although noting that Oneida dealt most directly with 25 U.S.C. § 177, the Board found that sec. 81 served the same protective purposes as sec. 177, and concluded that "the tribal lands of the St. Regis Mohawk Reservation are protected under 25 U.S.C. § 81 to the same extent as tribal lands held in trust by the United States." 20 IBIA at 73-74.

for rights of way, for a period not exceeding fifty years from the date of issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes \* \* \*; Provided, That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest \* \* \*.

43 U.S.C. § 961 set forth the intent of Congress that rights-of-way would be granted for electrical poles and lines crossing, inter alia, Indian reservations. As is evident from United States v. Oklahoma Gas & Elec. Co., 318 U.S. 206 (1943), the Department, during the period in which the agreements at issue here were executed, implemented that statute on Indian lands (except, apparently, those in New York). 7/

Since the enactment of 25 U.S.C. § 323 in 1948, 43 U.S.C. § 961 has been effectively superseded, although it continues to be cited in the Department's regulations governing rights-of-way for electrical poles and lines on Indian lands. See 25 C.F.R. § 169.27; see also 25 C.F.R. § 161.27 (1958); 25 C.F.R. § 161.27 (1969).

It clearly appears both from the agreements themselves and the Federal law in effect when the agreements were executed that a right-of-way was the intended vehicle by which authority was to be granted for the construction, operation, and maintenance of electric poles and lines across Indian reservations.

Appellant contends, however, that the agreements do not convey an interest in Indian lands, such as would be granted through a right-of-way, but rather "are mere privileges or permits to use the highways, streets and roads of the Tuscarora and Tonawanda Indian Reservations." Apr. 22, 1998, Reply Brief at 1. Based on its theory that the agreements do not convey an interest in Indian lands, Appellant argues that the agreements are merely contracts relative to Indian lands within the meaning of 25 U.S.C. § 81. 8/

---

7/ In Oklahoma Gas & Elec. Co., the Supreme Court rejected the Department's attempt to implement 43 U.S.C. § 961 on off-reservation allotted land. The Department's Solicitor subsequently advised that the Department should thereafter implement the statute on allotted lands only when those lands were located within Indian reservations. Solicitor's Memorandum, Apr. 13, 1943, II Op. Sol. on Indian Affairs 1202.

8/ Curiously, in apparent contradiction of this argument, Appellant's entire posture in this appeal, as well as in the PSC and State and Federal court cases which preceded this appeal, is that it has a right to enter onto

While conceding that State law is not controlling, Appellant nevertheless argues that State law is persuasive authority as to the nature of the rights which Appellant acquired. The State court cases which Appellant cites hold that a telephone company--and presumably Appellant as another public utility--has only a privilege or permit to use the public streets and roads, and that that privilege or permit can be withdrawn at the discretion of the governmental entity with jurisdiction over the public streets or roads involved. However, the essential difference here--which Appellant concedes, but does not appear truly to understand or accept--is that Appellant's rights to use Reservation lands are governed by Federal, not State, law. Therefore, it is of little consequence what rights Appellant might, or might not, have under State law off-reservation. The question is what, if any, rights Appellant has under Federal law on-reservation.

Furthermore, the State case law on which Appellant relies relates only to the rights of a public utility in the public streets and roads. Appellant's rights under the agreements are not limited to use of the public streets and roads on the Reservations, but rather include the right to use "the common unallotted lands of the \* \* \* Reservation, as well as \* \* \* the allotted lands." The State case law cited by Appellant would not in any event be precedent for the nature of any interest Appellant has under the agreements in private on-reservation lands.

Appellant argues that the Nations did not intend to grant it rights-of-way. Part of this argument is again based on State law; *i.e.*, that "Appellant entered into the Franchise Agreements with the Nations for the provision of electric service in the same manner as the franchises obtained from municipalities" under State law. Opening Brief at 8. The Board understands this argument to refer to the nature of the interest Appellant would have under the State case law just discussed. Although Appellant may have intended that its rights would be identical to the rights given by municipalities, the Board finds no evidence in the materials before it supporting a conclusion that the Nations understood or shared that intent.

The second part of Appellant's Tribal intent argument is that if the Nations had intended to grant it rights-of-way, they would have entered into an easement pursuant to 43 U.S.C. § 961, and because the agreements do not conform to the requirements of section 961, the Nations did not intend to convey rights-of-way.

The Board would have rejected this argument simply because it is circular reasoning. However, it finds that the materials before it affirmatively undermine the argument. With its Opening Brief, Appellant submitted a copy

---

fn. 8 (continued)

Reservation lands and to provide electrical service to anyone residing on those lands, and that its right is not subject to restriction by the Nations and is "enforceable against the Tribe[s] \* \* \* independent of their continuing consent." United States v. Southern Pacific Transportation Co., 543 F.2d 676, 699 (9th Cir. 1976).

of a December 9, 1936, decision by a PSC Hearing Examiner in Case No. 8887, regarding the petition of NLOPC to construct an electric plant on the Tonawanda Reservation and to exercise the rights granted under the Tonawanda agreement (PSC Decision). The PSC decision shows that, as previously mentioned, one member of the Tonawanda Council of Chiefs believed that the agreement was subject to Federal approval. The PSC Decision discussed this question and stated at page 12:

While not claiming that the acts referred to constitute an authoritative precedent, [the State-appointed attorney for the Tonawanda Band], in his testimony [before the PSC], referred to other rights or easements which have been granted by the Council of Chiefs of the Tonawanda Nation without the approval of the Federal authorities. Among others, he mentioned the easement granted, several years ago, to the West Shore Railroad Company for the widening of its right-of-way through the reservation, such easement being for the period of 99 years. He expressed the opinion that the contract with [NLOPC] does not require the approval of the Commissioner of Indian Affairs or of the Secretary of the Interior. [9/]

Similarly, in Tuscarora Nation of Indians v. Power Authority, 257 F.2d 885, 889 (2nd Cir.), cert. denied, 358 U.S. 841 (1958), vacated as moot sub nom. McMorran v. Tuscarora Nation, 362 U.S. 608 (1960), the court of appeals discussed easements for telephone poles and other uses which had been entered into by tribes located in the State and which also did not receive Federal approval.

It appears most likely that the Nations did not require the agreements to conform to 43 U.S.C. § 961 because they did not then believe that section 961 applied on their Reservations. The Board concludes that the fact that the Nations did not require that the agreements conform to section 961 does not show that they intended to grant an interest less than a right-of-way.

Appellant argues that, although the Nations could grant it rights-of-way under Federal law, "there is no mandate that Appellant and the Nations proceed by right-of-way grant. Given the sovereignty of the Nations, the more logical conclusion is that the Nations should be able to authorize service facilities without granting rights-of-way." Opening Brief at 8.

The short answer to this argument is that Appellant is wrong. If the interests granted are rights-of-way within the meaning of Federal law, then the Federal right-of-way statutes dictate the manner in which Appellant and the Nations must proceed.

---

9/ Despite his belief that Federal approval was not required, the attorney for the Tonawanda Band submitted the agreement to the Department. The response, which has been previously mentioned, was that no Federal approval was necessary.

Appellant contends that the application of the right-of-way provisions of 25 U.S.C. § 323 to the agreements is "inconsistent with a literal reading of 25 U.S.C. §81 and Congress' intent when enacting that statute." Opening Brief at 9. Arguing that the Federal courts have held that section 81 is a broad statute intended to cover almost all transactions relative to Indian lands that are not covered by a specific statute, Appellant reasons:

Since there was no intent for the Franchise Agreements to be easements and, thus, they are not rights-of-way subject to the right-of-way statutes and regulations, and there are no specific statutes governing the Franchise Agreements, 25 U.S.C. §81 must govern the Franchise Agreements as "...transactions relative to Indian land for which Congress has not passed a specific statute." Wisconsin Winnebago [Business Committee v. Koberstein], 762 F.2d 613, 619 (7th Cir. 1985)]. \* \* \* To interpret the Franchise Agreements as easements would be completely inconsistent with the intent of the Nations and the statutes and regulations. [The Area Director's] Decision disregards the intent of the Nations in contracting with Appellant's predecessors-in-interest and gives [the Area Director] the unchecked discretion to declare all "contracts relative to the use of Indian land" subject to the right-of-way statutes and regulations relegating 25 U.S.C. §81 to having no application and, thus, in effect repealed, a result beyond [the Area Director's] jurisdiction and disfavored by the courts.

Appellant's Opening Brief at 11-12.

Appellant has presented no argument which convinces the Board that the agreements conveyed mere "privileges," rather than rights-of-way. The Board therefore rejects Appellant's contention that there is no specific statute governing the agreements. When the agreements were executed, they were governed by 43 U.S.C. § 961. They are now governed by 25 U.S.C. § 323.

This holding does not constitute a Departmental "repeal" of 25 U.S.C. § 81. Nor does it suggest that, in the future, the Department will construe all contracts relating to Indian lands to be rights-of-way. The nature of each agreement will continue to be determined on the particular facts of each case. However, the holding does recognize that the type of activity in which Appellant is engaged on Indian lands is governed by a specific Federal statute which requires the granting of a right-of-way.

The Board holds that, because the agreements granted rights-of-way over and across the Tonawanda and Tuscarora Reservations, but were entered into without complying with applicable Federal law, they were, and are, void. 10/

---

10/ The Board hopes that, with the legal situation clarified, the parties can begin to work together--as they apparently previously could not--toward the goal of providing electrical service on the Reservations in a manner consistent with tribal sovereignty.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's January 29, 1996, decision is affirmed. 11/

\_\_\_\_\_  
//original signed

Kathryn A. Lynn  
Chief Administrative Judge

I concur:

\_\_\_\_\_  
//original signed

Anita Vogt  
Administrative Judge

---

11/ The Board considered all arguments not specifically addressed, and either rejected them or found discussion of them unnecessary to the resolution of this appeal.